Real Property and Business Litigation Report

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Manuel Farach

Green Emerald Homes, LLC v. Federal National Mortgage Association, Case No. 2D16-2575 (Fla. 2d DCA 2017).
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National Collegiate Student Loan Trust 2007-1 v. Lipari, Case No. 5D16-156 (Fla. 5th DCA 2017).
The giving of notice of assignment under Florida Statute section 559.715 is not a condition precedent to filing suit for collection of a student loan when the assignee takes all rights in the consumer debt.

Provitola v. Comer, Case No. 5D16-3027 (Fla. 5th DCA 2017).
The obstruction of a public street is a public nuisance and individuals cannot maintain an action for the obstruction unless they have suffered a special injury.

Fogarty v. Nationstar Mortgage, LLC, Case No. 5D16-3193 (Fla. 5th DCA 2017).
A trial court can on its own calculate interest and escrow amounts in a foreclosure judgment when substantial, competent evidence is admitted that proves the principal and escrow amounts due.

Third District Court of Appeal

State of Florida

Opinion filed August 02, 2017.
Not final until disposition of timely filed motion for rehearing.

No. 3D16-2672
Lower Tribunal No. 12-15813

Dev D. Dabas and Sumedha Dabas,
Appellants,

vs.

Boston Investors Group, Inc., et al.,
Appellees.

An Appeal from a non-final order from the Circuit Court for Miami-Dade County, Eric Hendon, Judge.

Feldman Law, and Andrew M. Feldman, for appellants.

Jaramillo Law PA, and Sebastian Jaramillo, for appellee Boston Investors Group, Inc.

Before ROTHENBERG, C.J., and SUAREZ and SCALES, JJ.

ROTHENBERG, C.J.

The plaintiffs below, Dev D. Dabas and Sumedha Dabas (collectively, "the

Lenders"), appeal from a non-final order granting defendant Boston Investors Group, Inc.'s ("Borrower") motion to set aside a deficiency judgment as void pursuant to Florida Rule of Civil Procedure 1.540(b)(4). Because we conclude that, as a matter of law, the deficiency judgment is not void, we reverse the trial court's order granting the Borrower's motion for relief from judgment pursuant to rule 1.540(b)(4).

FACTS

In April 2011, the Borrower executed a mortgage and promissory note in the amount of $450,000 in favor of the Lenders. The Lenders initiated a foreclosure action against the Borrower, and the Borrower filed an answer and affirmative defenses. After the Borrower withdrew its amended answer and affirmative defenses, an unopposed final judgment of foreclosure in favor of the Lenders in the amount $579,409.92 was entered in May 2013. On June 11, 2013, the foreclosed property, which is vacant land located in Pinecrest, Florida, was sold at the foreclosure sale for $65,100 to the Lenders as the highest bidders.

In July 2013, the Lenders filed a motion for entry of a deficiency judgment and a memorandum of law ("motion for a deficiency judgment"), asserting the legal presumption that the foreclosure sale price represented the fair market value of the foreclosed property. The Lenders noticed the hearing on its motion for September 3, 2013, but the notice of hearing did not specifically set the hearing for

an evidentiary hearing. The Lenders emailed both the motion for a deficiency judgment and the notice of hearing to the Borrower's counsel of record.[1] The Borrower's counsel of record did not file a response to the Lenders' motion for a deficiency judgment, but he did appear at the September 3rd hearing.

Following the hearing, the trial court entered an order granting the Lenders' motion for a deficiency judgment in the amount of $508,602.62 and ordered the Borrower to complete a Fact Information Sheet (Form 1.997) within 45 days.[2] The order reflects that a copy of the order granting the deficiency judgment was provided to counsel of record and includes a mailing address for the Borrower. There is no transcript of this hearing.

Although the trial court's order granted a deficiency judgment of $508,602.62, the Borrower did not file a motion for rehearing or appeal the trial court's order. Instead, on October 7, 2013, thirty-four days after the deficiency judgment was entered, the Borrower filed a motion for reconsideration of the

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[1] The record reflects that the Borrower has been represented by numerous attorneys during the proceedings in the lower tribunal and, at times, the Borrower was unrepresented. The Borrower's appellate counsel, Sebastian Jaramillo, did not represent the Borrower when the Lenders filed their motion for a deficiency judgment or at the hearing on the motion for a deficiency judgment. Jaramillo filed his notice of appearance in the lower tribunal on August 8, 2016, and therefore, he is not responsible for any actions or inaction taken prior to that date.

[2] A separate order was subsequently entered for the sole purpose of tracking the language set forth in Florida Rule of Civil Procedure 1.560(c) relating to the completion of Form 1.997, and thus no substantive changes were made to the deficiency judgment.

deficiency judgment ("motion for reconsideration"). The motion cites to rule 1.540(b), however, it does not specify under what ground(s) the Borrower was seeking relief and does not track any of the language set forth in rule 1.540(b). Specifically, the motion for reconsideration did not allege that the judgment was void pursuant to rule 1.540(b)(4). Rather, the Borrower merely moved to vacate the deficiency judgment and requested an evidentiary hearing to determine the correct amount of the deficiency, arguing that according to the Miami-Dade Property Appraiser's website, the market value of the foreclosed property was $278,784.

On February 6, 2014, the Borrower filed an amended motion for reconsideration stating that it had obtained an appraisal of the foreclosed property, indicating that the foreclosed property was valued at $650,000 as of June 11, 2013, the date of the foreclosure sale. Once again, the amended motion for reconsideration cited to rule 1.540(b), but failed to cite to any particular ground set forth in rule 1.540(b) or contend that the judgment was void under rule 1.540(b)(4) or voidable under any other provision set forth in rule 1.540(b).[3] The motion for

[3] Rather than serving a motion for reconsideration, the Borrower should have served a motion for rehearing under Florida Rule of Civil Procedure 1.530, which provides that "[o]n a motion for rehearing of matters heard without a jury, . . . the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment." Assuming that the motion for reconsideration should have been treated as a motion for rehearing, the motion was untimely filed because it was not served within ten days of the date that the deficiency judgment was filed. Effective January 1, 2014, rule 1.530 was amended to extend the time for serving a

reconsideration and the amended motion for reconsideration were never set for a hearing or ruled on by the trial court.

The Borrower took no further action for approximately two years. However, on March 18, 2016, after learning that an execution had been issued on the deficiency judgment against other real property owned by the Borrower ("the Flagler property"), the Borrower filed a motion to set aside the deficiency judgment and execution, which motion was later amended in April 2016. After the Flagler property was sold at a Sheriff's sale to the Lender, the Borrower withdrew its motion and amended motion to set aside the deficiency judgment and execution.

On September 1, 2016, the Borrower attempted to amend its October 7, 2013 motion for reconsideration and requested that the motion for reconsideration be redesignated as a motion to set aside the deficiency judgment ("motion to amend and to redesignate"), which is the subject of this appeal. In the motion to amend and to redesignate, the Borrower argued that, although the October 3, 2013 motion was labeled as a motion for reconsideration, the content of the motion indicated that the Borrower was actually seeking to set aside the deficiency judgment under rule 1.540(b).

Unlike the motion for reconsideration, the motion to amend and to redesignate cites to specific grounds set forth in rule 1.540(b), including rule

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motion for rehearing from ten days to fifteen days.

1.540(b)(4), which permits a court to relieve a party from a void judgment at any time. Specifically, the Borrower argued that the deficiency judgment was void because the trial court did not conduct an evidentiary hearing, and thus, the Borrower's due process rights were violated.

Following a hearing, the trial court entered an order granting the Borrower's motion to set aside the deficiency judgment pursuant to rule 1.540(b)(4), finding that the deficiency judgment is void. The Lenders' non-final appeal followed.

ANALYSIS

The Lenders contend that, as a matter of law, the deficiency judgment is not void, but merely voidable, and therefore, the trial court improperly granted the Borrower's motion to set aside the deficiency judgment pursuant to rule 1.540(b)(4). We agree.

Generally, a trial court's ruling on a rule 1.540(b) motion for relief from judgment is reviewed on appeal for an abuse of discretion. See Epstein v. Bank of Am., 162 So. 3d 159, 161 (Fla. 4th DCA 2015). However, "[a] decision whether or not to vacate a void judgment is not within the ambit of a trial court's discretion; if a judgment previously entered is void, the trial court must vacate the judgment." Wiggins v. Tigrent, Inc., 147 So. 3d 76, 81 (Fla. 2d DCA 2014). Because the issue of whether a judgment is void presents a question of law, we review the trial court's ruling de novo. See Vercosa v. Fields, 174 So. 3d 550, 552 (Fla. 4th DCA

2015) ("Whether a judgment is void is a question of law reviewed de novo.").

"A void judgment is so defective that it is deemed never to have had legal force and effect." Sterling Factors Corp. v. U.S. Bank Nat'l Ass'n, 968 So. 2d 658, 665 (Fla. 2d DCA 2007). In contrast, a voidable judgment is a judgment that has been entered based upon some error in procedure that allows a party to have the judgment vacated, but the judgment has legal force and effect unless and until it is vacated." Id. Generally, a judgment is void if: (1) the trial court lacks subject matter jurisdiction; (2) the trial court lacks personal jurisdiction over the party; or (3) if, in the proceedings leading up to the judgment, there is a violation of the due process guarantee of notice and an opportunity to be heard. Tannenbaum v. Shea, 133 So. 3d 1056, 1061 (Fla. 4th DCA 2014). "Where, however, the court is legally organized and has jurisdiction of the subject matter and the adverse parties are given an opportunity to be heard, then errors, irregularities, or wrongdoing in proceedings, short of illegal deprivation of [an] opportunity to be heard, will not render the judgment void." Tannenbaum, 133 So. 3d at 1061 (internal quotations omitted). "This is particularly true when there is evidence that the party received actual notice of the proceedings generally and timely notice of the entry of any judgment against them." Sterling, 968 So. 2d at 666 (citations omitted).

In the instant case, it is undisputed that the trial court had subject matter jurisdiction and personal jurisdiction over the Borrower. Therefore, we must

determine whether the Borrower's due process rights were violated where the noticed hearing was not set as an evidentiary hearing,[4] but the Borrower's counsel of record was timely sent the notice of hearing and appeared at the hearing. Under these circumstances, we conclude that the Borrower's due process rights were not violated because the Borrower received notice of the hearing and was given an opportunity to be heard. Thus, the deficiency judgment was not void. As the judgment was not void, the trial court erred by setting aside the deficiency judgment pursuant to rule 1.540(b)(4).

Because the record on appeal does not contain a transcript of the hearing on the motion for entry of a deficiency judgment, we do not know what occurred at

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[4] We agree with the Borrower's argument that the hearing on the motion for a deficiency judgment should have been set as an evidentiary hearing because the deficiency, if any, is unliquidated. See Merrill v. Nuzum, 471 So. 2d 128, 129 (Fla. 3d DCA 1985); see also Liberty Bus. Credit Corp. v. Schaffer/Dunadry, 589 So. 2d 451, 452 (Fla. 2d DCA 1991) (noting that an evidentiary hearing is necessary to determine the amount of the deficiency, if any). At an evidentiary hearing on a motion for the entry of a deficiency judgment, the initial burden is on the party seeking the deficiency judgment. See Liberty Bus. Credit, 589 So. 2d at 452. "The correct formula to calculate a deficiency judgment is the total debt, as secured by the final judgment of foreclosure, minus the fair market value of the property, as determined by the court." Khan v. Simkins Indus., Inc., 687 So. 2d 16, 18 (Fla. 3d DCA 1996) (quoting Morgan v. Kelly, 642 So. 2d 1117 (Fla. 3d DCA 1984)). Although there is a legal presumption that "the foreclosure sale price equals the fair market value of the property," Thunderbird, Ltd. v. Great Am. Ins. Co., 566 So. 2d 1296, 1299 (Fla. 1st DCA 1990), the foreclosure sale price is not conclusive. Barnard v. First Nat'l Bank of Okaloosa Cnty., 482 So. 2d 534, 535 (Fla. 1st DCA 1986). "Therefore, once the party seeking a deficiency judgment introduces evidence of the foreclosure sale price, the burden shifts to the judgment debtor to present evidence concerning the property's fair market value." Liberty Bus. Credit, 589 So. 2d at 452.

the hearing. We do know, however, that if the Borrower was unprepared for the hearing or needed more time to be able to present evidence or attack the amount of the deficiency judgment, the Borrower could have sought a continuance, and if the trial court denied the motion for continuance, the Borrower could have filed a timely motion for rehearing or an appeal raising these issues. See Phadael v. Deutsche Bank Trust Co. Americas, 83 So. 3d 893, 895 (Fla. 4th DCA 2012) ("A rule 1.540(b) motion is not a substitute for a motion for rehearing or an appeal."). Instead, the Borrower waited well past the time to raise the arguments he now raises.

Because the judgment is not void, the trial court erred by granting the Borrower's motion for relief from judgment pursuant to rule 1.540(b)(4). Accordingly, we reverse the order granting the Borrower's motion to set aside the deficiency judgment as void.

The remaining arguments raised by the Borrower do not merit discussion.

Reversed.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

BRIAN FOGARTY and
CHRISTINE FOGARTY,

Appellants/Cross-Appellees,

v. Case No. 5D16-3193

NATIONSTAR MORTGAGE, LLC,
and SEAGROVE NEIGHBORHOOD
ASSOCIATION, INC.,

Appellees/Cross-Appellants.

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Opinion filed August 4, 2017

Appeal from the Circuit Court
for St. Johns County,
A.W. Nichols, III, Senior Judge.

D. Brad Hughes and Kayla A. Haines, of Jimerson & Cobb, P.A., Jacksonville, for Appellants/Cross-Appellees.

Nancy M. Wallace, of Akerman LLP, Tallahassee, William P. Heller,of Akerman LLP, Fort Lauderdale, and Eric M. Levine, of Akerman LLP, West Palm Beach, for Appellee/Cross-Appellant, Nationstar Mortgage, LLC.

Michael J. McCabe and Michelle P. Haines, of McCabe Law Group, P.A., Ponte Vedra Beach, for Appellee/Cross-Appellant, Seagrove Neighborhood Association, Inc.

WALLIS, J.

Brian and Christine Fogarty ("Borrowers") appeal a final judgment of foreclosure in favor of Nationstar Mortgage, LLC ("Nationstar"), arguing the trial court improperly denied their motion for involuntary dismissal. In its cross-appeal, Nationstar argues the trial court erred by omitting interest and escrow from the judgment and by dismissing appellee/cross-appellant, Seagrove Neighborhood Association, Inc. ("Seagrove"), as a superior lienholder. We affirm the trial court's denial of Borrowers' motion for involuntary dismissal without discussion. However, because the trial court improperly excluded interest and escrow amounts, we reverse and remand for modification of the final judgment. Additionally, we reverse the trial court's dismissal and remand for Seagrove's reinstatement as a party to the foreclosure action.

FACTS

In 2007, Borrowers executed a note and mortgage for $352,000 in favor of SunTrust Mortgage, Inc. ("SunTrust"). In December 2010, Nationstar sent Borrowers a welcome letter notifying them that it had replaced SunTrust as the servicer of their mortgage. In April 2013, Nationstar sent Borrowers a default letter, alleging a default date of November 11, 2009, and requiring the immediate payment of $124,082.20 to cure the default. After Borrowers failed to cure the default, Nationstar filed a foreclosure complaint, seeking "$340,795.31 that is due on principal on the Note and Mortgage, interest from October 1, 2009, late charges, costs of collection and reasonable attorney's fees, and such other expenses as may be permitted by the mortgage." The complaint also included Seagrove as a defendant, explaining that any interest it may claim in the mortgaged property "is subordinate, junior, and inferior to the lien of [Nationstar's] Mortgage."

Seagrove filed an answer and affirmative defenses seeking, *inter alia*, "a judgment determining that [Seagrove's] interest is superior to [Nationstar's] mortgage," and citing the recorded declaration of charter, easements, covenants, and restrictions for the neighborhood to support its entitlement to expenses and assessments. Borrowers also answered the complaint, asserting, as affirmative defenses, lack of standing, failure to satisfy a condition precedent, and lack of certification.

The case proceeded to trial in March 2016. At trial, Nationstar called one of its senior default case specialists. Through this witness, Nationstar successfully admitted the note, the mortgage, the welcome letter, the default letter, and its payment history for the mortgage. At the close of trial, Borrowers moved for involuntary dismissal, arguing the trial court improperly admitted the loan payment history and, thus, Nationstar failed to establish the amount due. Borrowers further argued the evidence failed to establish any amounts other than the principal, such as interest or escrow. Seagrove also moved for involuntary dismissal, arguing Nationstar presented no evidence to rebut Seagrove's claim that it had a superior lien position relative to the mortgage. In response to Seagrove's motion, Nationstar requested judicial notice of the recorded general warranty deed for the subject property, as well as the recorded mortgage, to show that, as a first mortgage, it had "priority over the homeowner's association lien." The trial court ultimately ruled as follows:

> Based on the testimony that I received today and the arguments that were made, I'm going to deny the motion for involuntary dismissal; however, I'm going to find for-- the only testimony that I think I can definitely put my finger on is the amount of principal that was described. So I'm going to find for the plaintiff in the principal amount of $340,795.31. And that is -- and find that the homeowner's association, who is Seagrove Neighborhood Association, Inc., as their lien is

> superior to the mortgage and they are not foreclosed; they are dismissed from the action.

Accordingly, the final judgment of foreclosure awarded Nationstar only the principal balance of $340,795.31.

INTEREST AND ESCROW

Nationstar argues the trial court improperly limited the award to only principal, ignoring the easily calculable interest and escrow amounts. In a typical foreclosure case, the plaintiff "proves the amount of indebtedness through the testimony of a competent witness who can authenticate the mortgagee's business records and confirm that they accurately reflect the amount owed on the mortgage." Wolkoff v. Am. Home Mortg. Servicing, Inc., 153 So. 3d 280, 281 (Fla. 2d DCA 2014). Furthermore, "[g]enerally, in a foreclosure action, unpaid principal and interest are 'liquidated damages.'" Zumpf v. Countrywide Home Loans, Inc., 43 So. 3d 764, 766 (Fla. 2d DCA 2010) (quoting Asian Imports, Inc. v. Pepe, 633 So. 2d 551, 552 (Fla. 1st DCA 1994)). "Damages are liquidated when the proper amount to be awarded can be determined with exactness from the cause of action as pleaded, i.e., from a pleaded agreement between the parties, by an arithmetical calculation or by application of definite rules of law." Asian Imports, Inc., 633 So. 2d at 552.

At trial, Nationstar's witness testified to the fixed interest rate—6.25%—and unpaid principal—$340,795.31—necessary for determining the amount of interest due. The payment history and note further support these figures. Nationstar also provided the trial court with the figures necessary to determine the escrow amount. The witness specifically addressed escrow amounts as follows:

> Q Were there any escrow advances also delineated in the payment history?
>
> A Yes.
>
> Q And if you were to add them up, would they be -- would they concur with the amounts that are due or being sought for in the judgment?
>
> A Yes.
>
> Q And all those numbers come from the payment history?
>
> A Yes.

Indeed, the payment history includes a column showing escrow disbursements, labeled "ESCROW."

"Values awarded in a foreclosure judgment must be based on competent, substantial evidence." Boyette v. BAC Home Loans Servicing, LP, 164 So. 3d 9, 10 (Fla. 2d DCA 2015). The witness's testimony, combined with the payment history and the note, provided the trial court with competent, substantial evidence of the fixed interest rate and escrow disbursements. Using this trial evidence, the trial court can easily calculate Nationstar's interest and escrow amounts. See Salauddin v. Bank of Am., N.A., 150 So. 3d 1189, 1190 (Fla. 4th DCA 2014) ("Since the amount of interest from the time the homeowner defaulted on the loan until May 1, 2012, was based on the starting fixed interest rate (eight percent), the amount of interest owed for those months is supported by the note and payment history."); cf. Michel v. Bank of N.Y. Mellon, 191 So. 3d 981, 983–84 (Fla. 2d DCA 2016) (reversing an award of interest where "[t]he bank did not introduce records in support of the claimed interest or the actual amount contained in the final judgment" and failed to demonstrate "what the applicable interest rate was from the time of default or how much interest accrued from that point forward"). Thus, we remand

for the trial court to modify the foreclosure judgment to include the interest and escrow amounts.

LIEN SUPERIORITY

Nationstar argues the trial court improperly dismissed Seagrove as a superior lienholder to Nationstar. We reverse the dismissal and remand for the trial court to reinstate Seagrove as a party to this litigation. Because neither party presented competent evidence to establish which one had a superior interest, "[o]n remand, either party may request an evidentiary hearing to resolve this issue." See Hidden Ridge Condo. Homeowners v. Greentree Servicing, LLC, 167 So. 3d 483 (Fla. 5th DCA 2015) (citing Schroth v. Cape Coral Bank, 377 So. 2d 50 (Fla. 2d DCA 1979)).

AFFIRMED in Part; REVERSED in Part; and REMANDED with Instructions.

PALMER and LAMBERT, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREEN EMERALD HOMES, LLC,

Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION ("Fannie Mae"), a Corporation Organized and Existing Under the Laws of the United States of America; FLORENCE L. GYEBI a/k/a FLORENCE OPOKU-NUAMAH; CHAPEL PINES HOMEOWNERS ASSOCIATION, INC.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for SunTrust Mortgage Inc.; UNKNOWN PERSON(S) IN POSSESSION OF THE SUBJECT PROPERTY,

Appellees.

Case No. 2D16-2575

Opinion filed August 2, 2017.

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Pasco County; Ray E. Ulmer, Jr., Senior Judge.

Mark P. Stopa of Stopa Law Firm, Tampa, for Appellant.

H. Michael Muniz of Kahane & Associates, P.A., Plantation, for Appellee Federal National Mortgage Association.

No appearances for remaining
Appellees.

WALLACE, Judge.

Green Emerald Homes, LLC (Green Emerald), appeals from the trial court's order denying its motion to quash service and to vacate default and final judgment in favor of Federal National Mortgage Association (Fannie Mae).[1] Because we find that Fannie Mae failed to plead the necessary jurisdictional allegations in its complaint to perfect substituted service on the Florida Secretary of State and that section 605.0117, Florida Statutes (2014), does not make such allegations unnecessary, we reverse and remand for further proceedings.

I. THE FACTUAL AND PROCEDURAL BACKGROUND

On June 24, 2014, Fannie Mae filed a verified complaint to foreclose a mortgage against Green Emerald. Fannie Mae attached to its complaint a copy of the note, mortgage, and other documents. In its complaint, Fannie Mae alleged that Green Emerald was the owner of the property and that the note and mortgage were in default. Fannie Mae attempted to serve the requisite documents on Green Emerald's registered agent, Roberta Kaplan, on several occasions without success. Because of Kaplan's unavailability for service of process, Fannie Mae served Green Emerald through substituted service on the Secretary of State as authorized by chapter 48, Florida Statutes (2014).

[1]We have jurisdiction in accordance with Florida Rule of Appellate Procedure 9.130(a)(5).

On August 22, 2014, Fannie Mae filed a motion for a clerk's default. The motion was granted, and the default was entered on September 3, 2014. Then, Fannie Mae filed a motion for final summary judgment, which the trial court granted. The trial court entered a final judgment of foreclosure on February 5, 2015.

Over two months later, on April 14, 2015, Green Emerald filed a verified motion to quash service and to vacate default and final judgment. In its motion, Green Emerald alleged that it had no knowledge of Fannie Mae's lawsuit because it had not been properly served. Green Emerald argued that the substitute service of process on the Secretary of State was defective because Fannie Mae did not plead the requisite jurisdictional allegations in its complaint. Specifically, Green Emerald argued that under section 48.181, Fannie Mae's substitute service of process was not valid because Fannie Mae failed to allege in its complaint that Green Emerald was either a nonresident of Florida or a resident which had concealed its whereabouts. Accordingly, Green Emerald asked the trial court to quash service of process and to vacate the default and final judgment of foreclosure.

In May 2016, the trial court held a hearing on Green Emerald's motion. At the hearing, Green Emerald made the same arguments that it had raised in its motion. Fannie Mae argued that it had properly effected substitute service because it had complied with the service requirements set forth in section 605.0117. Fannie Mae contended that it was unnecessary for it to comply with section 48.181 concerning substitute service because (1) section 48.181 applies only to service on nonresidents of Florida and (2) section 605.0117 created an independent method for service of process

on limited liability companies.[2] Without providing any explanation, the trial court denied the motion to quash and vacate. On appeal, the parties make the same arguments.[3]

II. DISCUSSION

Initially, we note that Fannie Mae's argument that section 48.181 only applies to nonresidents of Florida is belied by the text of the statute. See § 48.181(1) (stating that the Florida Secretary of State is permitted to accept substituted service on behalf of "any person who is a resident of the state and . . . conceals his or her whereabouts" (emphasis added)). Therefore, the only substantial issue that we are called upon to determine is whether Fannie Mae was required to plead in its complaint certain jurisdictional allegations in order to properly serve Green Emerald through substituted service on the Secretary of State. We review this issue de novo. See Mecca Multimedia, Inc. v. Kurzbard, 954 So. 2d 1179, 1181 (Fla. 3d DCA 2007).

"[I]n order to support substituted service of process on a defendant [through the Secretary of State], the complaint must allege the jurisdictional requirements prescribed by statute. If it fails to do so, then a motion to quash process should be granted." Alhussain v. Sylvia, 712 So. 2d 806, 806 (Fla. 4th DCA 1998); see also Jupiter House, LLC v. Deutsche Bank Nat'l Tr. Co., 198 So. 3d 1122, 1123 (Fla. 4th DCA 2016) ("[T]he plaintiff failed to amend its complaint to allege the necessary

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[2]Section 605.0117 was enacted as part of the Florida Revised Limited Liability Company Act, sections 605.0101-.1108, which became effective on January 1, 2014. See ch. 2013-180 §§ 2, 29, Laws of Fla. (2013).

[3]We need not address the other two issues that Fannie Mae raised in its answer brief. Green Emerald clearly preserved the main issue for appeal. Also, the issue of whether the trial court's order arrives here with a presumption of correctness is not in dispute.

allegations to support substitute service." (citing Alhussain, 712 So. 2d 806)). "The burden of pleading facts that support, as a matter of law, the applicability of substituted service falls on the party seeking to invoke the provisions of [section 48.181]." Mecca, 954 So. 2d at 1182. Here, because Fannie Mae attempted to serve Green Emerald through substituted service on the Secretary of State under chapter 48, we must determine whether Fannie Mae pleaded the necessary jurisdictional allegations to fall within the ambit of the statute.

Section 48.181(1) permits the Secretary of State to accept service for any nonresident defendant or Florida resident who either (1) conceals his whereabouts or (2) previously conducted business in Florida but subsequently becomes a nonresident. See also Mecca, 954 So. 2d at 1182. Accordingly, in order to perfect substituted service on a nonresident defendant or a Florida resident defendant, a plaintiff must plead one of these two grounds. See Jupiter House, 198 So. 3d at 1123; Mecca, 954 So. 2d at 1182; Alhussain, 712 So. 2d at 806-07.

In this instance, Fannie Mae's complaint was devoid of any of the above jurisdictional allegations. With regard to Green Emerald, Fannie Mae alleged only that it was the owner of the property that was the subject of the foreclosure action. Such an allegation is not sufficient to authorize substituted service. Accordingly, since Fannie Mae "failed to plead the required statutory prerequisites or to allege the ultimate facts that invoke the statute," we hold that it did not perfect substituted service on Green Emerald. Alhussain, 712 So. 2d at 807 (reversing order denying motion to quash service of process because the complaint failed to allege the necessary statutory jurisdictional requirements, i.e., the defendant was either a nonresident or was a Florida

resident concealing his whereabouts); see also Jupiter House, 198 So. 3d at 1123 (same); Mecca, 954 So. 2d at 1182-83 (same).

Furthermore, we are unpersuaded by Fannie Mae's argument that it was unnecessary for it to make jurisdictional allegations because section 605.0117 created an independent method of service of process for limited liability companies. We find no provision in section 605.0117 that would relieve Fannie Mae of its obligation to plead the requisite jurisdictional allegations when effecting substitute service of process. Although we recognize that section 605.0117(3) authorizes a plaintiff to serve a defendant through substitute service of process on the Secretary of State, such a provision does not establish a new method of service of process. Indeed, on a closely related issue, this court found that section 605.0117 did not create a new, independent method of effecting substitute service on a defendant. See Green Emerald Homes, LLC v. Nationstar Mortg., LLC, 210 So. 3d 263, 264-65 (Fla. 2d DCA 2017). Rather, this court agreed that a plaintiff was still required to comply with the notice requirements in section 48.161. Id. at 265 (citing Jupiter House, 198 So. 3d at 1124).

Finally, although neither party brought it to our attention, we note from our own review of chapter 48 that section 48.062 provides for service on limited liability companies and refers to section 48.181.[4] It states that "if, after reasonable diligence, service of process cannot be completed . . . , service of process may be effected by service upon the Secretary of State as agent of the limited liability company as provided for in s. 48.181." § 48.062(3).

[4]Like section 605.0117, section 48.062 was enacted as part of the law that created the Florida Revised Limited Liability Company Act. See ch. 2013-180, § 3, Laws of Fla. (2013).

III. CONCLUSION

For the foregoing reasons, the trial court erred in denying Green Emerald's motion to quash service and to vacate default and final judgment in favor of Fannie Mae. Accordingly, we reverse the order denying the motion to quash and vacate default and final judgment, and we remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

LaROSE, C.J., and KHOUZAM, J., Concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

J.P. MORGAN SECURITIES, LLC, MADHUKAR NAMBURI
and ESTEBAN SCHRECK,

Appellants,

v. **Case No. 5D15-4272**

GEVERAN INVESTMENTS LIMITED, LIGHTING SCIENCE
GROUP CORPORATION, PEGASUS CAPITAL ADVISORS, L.P.,
PEGASUS CAPITAL, LLC, PEGASUS CAPITAL ADVISORS GP,
LLC, PCA LSG HOLDINGS, LLC, et al.,

Appellees.
_____/

Opinion filed August 4, 2017

Appeal from the Circuit Court for
Orange County,
Alice Blackwell, Judge.

Mayanne Downs and Rachael M. Crews, of Gray
Robinson, P.A., Orlando, and Adam Balin, James I.
McClammy, Amelia T.R. Starr and Christopher
Ratcliffe Le Coney, of Davis Polk & Wardwell, LLP,
New York, NY, for Appellants, J.P. Morgan, et al.[1]

Thomas A. Zehnder and David B. King, of King,
Blackwell, Zehnder & Wermuth, P.A., Orlando,
and Bruce S. Rogow and Tara A. Campion,

[1] Cases 5D15-4272 and 5D15-4273, traveling together on appeal, were consolidated for oral argument and for purposes of this opinion. In case 5D15-4272, J.P. Morgan, et al., appeal from the denial of a motion to dismiss as well as summary final judgment in favor of Geveran Investments Limited. In case 5D15-4273, Lighting Science Group Corp., et al., also appeal from the summary final judgment entered in Geveran's favor. Because J.P. Morgan initiated the appeal in case 5D15-4272 and did not join in the appeal in case 5D15-4273, J.P. Morgan is an Appellant in case 5D15-4272 and an Appellee in case 5D15-4273 pursuant to Florida Rule of Appellate Procedure 9.020(g)(2).

of Bruce S. Rogow, PA, Fort Lauderdale,
for Appellee, Geveran Investments Limited.

Barry Richard of Greenberg Traurig, P.A.,
Tallahassee, Alan T. Dimond, David A. Coulson
and Ian M. Ross, of Greenberg Traurig, P.A., Miami,
for Appellee, Lighting Science Group Corporation.[2]

Daniel S. Newman, P.A., of Broad and Cassel,
Miami, Counsel for Amicus Curiae The Florida
Securities Dealers Association, Inc.

Nicholas A. Shannin, of The Shannin Law Firm,
Orlando, and Jonathan K. Youngwood, Kavitha
S. Sivashanker and Stephen A. O'Connor, of
Simpson Thacher & Bartlett LLP, New York, NY,
Attorneys for Amicus Curiae Securities Industry
and Financial Markets Association.

No Appearance for other Appellees.

And

LIGHTING SCIENCE GROUP CORP., RICHARD WEINBERG,
GREGORY KAISER AND PEGASUS CAPITAL ADVISORS, L.P.

Appellants,

v. **Case No. 5D15-4273**

GEVERAN INVESTMENTS LIMITED, J.P. MORGAN
SECURITIES, LLC, PEGASUS CAPITAL ADVISORS, L.P.,
PEGASUS CAPITAL, LLC, PEGASUS CAPITAL
ADVISORS, GP, LLC, PCA LSG HOLDINGS, LLC, et al.,

Appellees.
_____/

Opinion filed August 4, 2017

[2] Likewise, because Lighting Science Group Corp., Pegasus Capital Advisors, Richard Weinberg, and Gregory Kaiser did not join J.P. Morgan, et al., in case 5D15-4272, and instead appealed the summary final judgment in case 5D15-4273, these parties are Appellants for purposes of case 5D15-4273 and Appellees for purposes of case 5D15-4272, pursuant to Florida Rule of Appellate Procedure 9.020(g)(2).

Appeal from the Circuit Court for
Orange County,
Alice Blackwell, Judge.

Barry Richard of Greenberg Traurig, P.A., Tallahassee, Alan T. Dimond, David A. Coulson and Ian M. Ross, of Greenberg Traurig, P.A., Miami, and, for Appellants, Lighting Science Group Corporation, et al.

Bruce S. Rogow and Tara A. Campion of Bruce S. Rogow, P.A., Ft. Lauderdale, Thomas A. Zehnder and David B. King, of King, Blackwell, Zehnder & Wermuth, P.A., Orlando, for Appellee, Geveran Investments Limited.

Nicholas A. Shannin, of The Shannin Law Firm, Orlando, Jonathan K. Youngwood, Kavitha S. Sivashanker and Stephen A. O'Connor, of Simpson Thacher & Bartlett LLP, New York, NY, Attorneys for Amicus Curiae Securities Industry and Financial Markets Association.

Daniel S. Newman, P.A., of Broad and Cassel, Miami, Counsel for Amicus Curiae The Florida Securities Dealers Association, Inc.

No Appearance for other Appellees.

COHEN, C.J.

ON MOTION FOR REHEARING

Upon considering Appellee Geveran Investments' motion for clarification and correction pursuant to Florida Rule of Appellate Procedure 9.330, we grant the motion, recall our earlier opinion issued June 9, 2017, and substitute this opinion in its place.

Lighting Science Group Corp., et al.[3] ("LSG") and J.P. Morgan Securities, LLC, Madhukar Namburi, and Esteban Schreck[4] ("J.P. Morgan") (collectively, "defendants") appeal the trial court's entry of summary final judgment in favor of Geveran Investments Limited ("Geveran"). The parties stipulated to final judgment and the dismissal of their additional claims and affirmative defenses for the purposes of appealing the trial court's entry of partial summary judgment on Geveran's claim under the Florida Securities and Investor Protection Act ("FSIPA"), sections 517.011–32, Florida Statutes (2012). The final judgment awarded Geveran $25 million in rescissory damages under section 517.221(3)(a), Florida Statutes (2012), along with $6,752,280 in prejudgment interest; $4,456,787.40 in attorneys' fees; and $469,061.93 in costs: a total recovery of $36,678,129.33, for which the defendants are jointly and severally liable.

The defendants argue that the trial court erred in entering summary judgment in Geveran's favor because genuine issues of material fact exist as to Geveran's entitlement to relief. We agree and reverse and remand this case for further proceedings. We also find that the court erred in denying J.P. Morgan's motion to dismiss Geveran's claims against Namburi and Schreck because the complaint failed to allege facts sufficient to establish that they acted as agents of the seller, LSG. Therefore, on remand the trial court is directed to dismiss LSG's claims against Namburi and Schreck.

[3] The other Appellants in case 5D15-4273 are Pegasus Capital Advisors, LP, which owns a controlling stake in LSG, Richard Weinberg, LSG's CEO and a senior partner at Pegasus, and Gregory Kaiser, LSG's CFO.

[4] Namburi and Schreck are employees of J.P. Morgan's investment banking group. Namburi is the executive director of the group, and Schreck is the vice president. Both Namburi and Schreck were involved in assisting LSG in soliciting Geveran's investment.

LSG is a Delaware corporation with executive offices in Satellite Beach, Florida, and is controlled by Pegasus Capital Advisors, L.P., a U.S.-based private equity fund. LSG originally focused on selling high-end, made-to-order lighting, but in 2010, LSG shifted its business model to designing, manufacturing, and marketing light-emitting diode ("LED") light products, including replacement bulbs and fixtures, for retail and commercial customers.[5] Geveran is an international investment company, one of several companies within the Fredriksen Group, organized under the laws of Cyprus. Geveran employed Fredrick Halvorsen, a Norwegian businessman and investor, to identify investment opportunities on its behalf.[6]

Halvorsen anticipated a "massive shift towards LED lighting" and sought out investment opportunities within the green-energy industry for Geveran. Halvorsen specifically sought "pre-IPO" investments—companies that were not publicly traded on major stock exchanges but that were planning on becoming publicly traded in the near future.[7]

[5] Because we are reviewing an order granting summary judgment, we present the facts in the light most favorable to the nonmoving party, the defendants, and draw all reasonable inferences in the nonmoving party's favor. See Martins v. PNC Bank, Nat'l Ass'n, 170 So. 3d 932, 935 (Fla. 5th DCA 2015).

[6] Halvorsen had previously been the CEO and CFO of a Norwegian technology company valued in the billions.

[7] Technically, LSG was a "re-IPO" in that it already offered a small volume of shares to the public on the "over-the-counter" ("OTC") market. LSG's S-1/A noted that the value of these shares had been low and trading of them thin because Pegasus controls LSG and minority shareholders would have little control over LSG. Given how thinly traded LSG's stock is, we have placed no significance on the fluctuations of the stock's price over the course of the events giving rise to this dispute.

Prior to Geveran's investment, J.P. Morgan agreed to work as a placement agent and underwriter for LSG. Under the terms of the agreement, J.P. Morgan agreed to "assist the Company [LSG] in soliciting and receiving an offer from the Purchasers to purchase Securities."[8] At Halvorsen's request, J.P. Morgan communicated Geveran's interest in investing in LSG.

Halvorsen met with representatives of LSG, including LSG's director Richard Weinberg and CFO Gregory Kaiser, along with representatives from J.P. Morgan, including Namburi and Schreck, and representatives of Pegasus in Florida on April 4, 2011, to discuss a possible investment. Halvorsen sat through multiple presentations, including presentations by Weinberg and Namburi, about LSG's finances. Halvorsen also heard a presentation about LSG's initiatives to improve its gross profit margin.[9] Halvorsen reviewed various financial projections and LSG's 2010 form 10-K,[10] which was filed with the SEC on April 1, 2011.

[8] The agreement entitled J.P. Morgan to rely on LSG's company information without independent verification and provided for indemnification by LSG for any liability. The agreement also specified that LSG's past financial data were prepared in accordance with generally accepted accounting principles ("GAAP").

[9] An expert for Geveran explained that gross profit is determined by subtracting the cost of goods sold—all of the direct costs associated with producing the products—from total revenue. When gross profits are divided by revenue and multiplied by 100%, the resulting percentage, referred to as "gross margin," provides an estimate of the profits on each unit sold. Companies with high gross margins will become even more profitable as revenues grow while companies with low gross margins will continue to generate low profits even as their business expands.

[10] The form 10-K is an annual report that provides a "comprehensive overview of the company's business and financial condition and includes audited financial statements." SEC, Form 10-K, (June 26, 2009), https://www.sec.gov/answers/form10k.htm.

Halvorsen prepared his own analysis of LSG in an email dated April 28, 2011. He noted that LSG had a planned IPO within the next twelve months and was on pace to begin earning money in July and to have positive cash flow by December. He also noted a general shift toward LED lighting and LSG's recent distribution agreement with Home Depot, which would expand LSG's retail sales. He noted, however, that the investment was contingent on LSG shifting its manufacturing base from the United States to Mexico and that the IPO required LSG to continue to improve its earnings.

Geveran relied on Halvorsen's expertise and presentations from LSG and J.P. Morgan for its due diligence review. Geveran ultimately agreed to purchase 6,250,000 shares of LSG at $4 per share: a total investment of $25 million. The agreement certified that the 2010 form 10-K provided to Halvorsen complied with all relevant laws and that the financial statements included therein complied with generally accepted accounting principles ("GAAP"). Halvorsen signed the subscription agreement with LSG on behalf of Geveran on May 10, 2011.[11]

Prior to signing the agreement, LSG had filed a form S-1/A with the SEC in anticipation of making a re-IPO in the summer of 2011. In response, the SEC sent LSG a fax on April 28, 2011, raising several concerns with LSG's S-1/A, including concerns with note five of its financial statements regarding inventories. In note five, LSG explained that because it was in an early stage of development, it classified its obsolete, unsold inventory as "research and development" rather than a cost of manufacturing—a "cost of

[11] The agreement was a "Regulation S" offering, meaning that the securities offered did not have to be registered under section 5 of the Securities Act of 1933 because they were offered outside of the United States. See Lighting Sci. Grp. Corp., Current Report (Form 8-K) (May 10, 2011) (announcing Regulation S subscription agreement).

goods sold." The SEC's letter noted the SEC's view, expressed in ASC section 420-10-S99-3, that these costs should be included in cost of goods sold.[12] A copy of the SEC's letter was emailed to Namburi and Schreck, among many others, moments after it was received. Halvorsen, however, was not provided the letter.[13] On May 3, the SEC sent a similar letter to LSG, this time taking issue with LSG's 2010 form 10-K—the same form 10-K referenced in the subscription agreement signed a week later and provided to Halvorsen. The second letter raised the same concerns as the previous letter, and Namburi and Schreck were again sent a copy of the letter soon after it was received.

The day before the subscription agreement was signed, Namburi forwarded Halvorsen an email that he had received from Kaiser containing information about LSG's April sales. Namburi had deleted the section of the email showing disappointing gross margins for LSG. Namburi later claimed that he deleted the numbers because he was unsure of their accuracy. In a separate email, Namburi expressed frustration to Kaiser that the April gross margins were around 3–6% when they had informed Halvorsen the margins would be around 9%.

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[12] Accounting Standard Codification, § 420-10-S99-3, available at https://asc.fasb.org/section&trid=2558983#d3e141019-122747 (login required).

[13] Namburi testified that he was "pretty confident" he had a conversation with Halvorsen about the SEC comments and LSG's compliance with GAAP, although he did not know the date. He also noted that the SEC's approval was key to the timing of LSG's re-IPO, which was an important milestone for the company, although he declined to offer an opinion about the materiality of the restatement.

Namburi also sent an email days before the subscription agreement was signed that referenced the SEC comment letters and stated that the comments would need to be disclosed to "our investors" even though the restatement was not material. The email was part of a chain related to soliciting additional investors for LSG, not including Geveran.

On May 12, after the subscription agreement had been signed, LSG responded to the SEC letters by explaining that its policy in 2008 and 2009 had been to purchase raw materials and supplies for research and development but to classify those materials as "obsolete" along with any unsold inventory—meaning LSG did not distinguish between materials actually used for research and development and unsold product. LSG initially claimed that only $2 million in 2009 and $445,000 in 2008 needed to be reclassified from research and development to cost of goods sold. Days later, LSG sent an additional letter to the SEC providing a materiality analysis based on Staff Accounting Bulletin 99.[14] The analysis concluded that the misstatements were not material because they had no impact on "any trends related to revenue, earnings, or EBITDA [earnings before interest, tax, depreciation, and amortization]" and would not have affected investors because LSG's business and revenue had significantly shifted since 2008 and 2009. LSG's accountant, McGladrey and Pullen, LLP, ("McGladrey") agreed with this determination and prepared a similar SAB 99 analysis. McGladrey had identified the accounting problem in 2009 and conducted a SAB 99 analysis that likewise concluded that no restatement was necessary.

The SEC responded on June 2 by asking for additional information and a more detailed explanation of how LSG decided to classify certain expenses as research and development or cost of goods sold and how LSG valued its obsolete goods. LSG was not able to provide data to justify its more limited restatement, leading the SEC to request that all of the amount of obsolete goods be reclassified as cost of goods sold. On June

[14] The bulletin provides "guidance in applying materiality thresholds to the preparation of financial statements." SEC Staff Accounting Bulletin: No. 99, 64 Fed. Reg. 45150 (Aug. 19, 1999). The bulletin instructs accountants to consider a variety of context-specific quantitative and qualitative factors in determining materiality.

16, LSG filed a form 8-K,[15] indicating that the 2008 and 2009 financial statements would need to be restated and included in the amended 2010 form 10-K. An amended form 10-K for 2010 soon followed. The results of the restatement were:

	Originally Reported Gross Profits ($) **Originally Reported Gross Margins (%)**	**Restated Gross Profits ($)** **Restated Gross Margins (%)**
2008	$ 4,069,993 19.6%	$ (448,110)[16] (2.2)%
2009	$ 6,621,977 21.1%	$ 2,495,867 8.0 %

The defendants maintain that the restatement only occurred to facilitate faster approval of LSG's form S-1/A and that the restatement was never material. The re-IPO was eventually put on hold and still has not occurred.

There is no record of Halvorsen's reaction to the restatement disclosed in the form 8-K, and he did not discuss the 2008 and 2009 gross margins with anyone from LSG or J.P. Morgan. The record does show that Halvorsen expressed continued confidence and optimism about Geveran's investment until LSG began to seek capital financing from other investors. LSG sold preferred stock to other investors, effectively diluting the value of Geveran's shares. Halvorsen unsuccessfully attempted to obtain better terms for Geveran's investment. These lawsuits followed approximately one year after the restatement.

Namburi, Schreck, and Pegasus each filed a motion to dismiss, but the trial court denied the motions. All parties later moved for summary judgment. The court granted

[15] Form 8-K is used to report material events that shareholders should be aware of—the SEC refers to this as "current reports." SEC, Fast Answer: Form 8-K, (Aug. 10, 2012), https://www.sec.gov/answers/form8k.htm.

[16] Parentheses indicate negative values.

partial summary judgment on Geveran's claim for violations of the FSIPA. The parties stipulated to dismissing their additional claims and to the entry of final judgment for the purposes of this appeal.

This Court reviews orders on motions for summary judgment de novo. Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). Summary judgment must be granted where the summary-judgment evidence shows the absence of any "genuine issue as to any material fact" and an entitlement to judgment as a matter of law. Fla. R. Civ. P. 1.510(c). The moving party has the burden of establishing the absence of any genuine issue of material fact, and all reasonable inferences are drawn in favor of the nonmoving party. Martins, 170 So. 3d at 935.

The FSIPA makes it unlawful to, "in connection with the offer, sale, or purchase of any investment or security, . . . obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, . . . not misleading." § 517.301, Fla. Stat. (2012). The FSIPA provides for a remedy of rescission for all violations of section 517.301 "if the plaintiff still owns the security." Id. § 517.211. Joint and several liability under section 517.301 extends to any "director, officer, partner, or agent [of the seller who] has personally participated or aided in making the sale or purchase." Id.

In E.F. Hutton & Co. v. Rousseff, 537 So. 2d 978, 979 (Fla. 1989), the Florida Supreme Court analogized claims under section 517.211(3) seeking rescission to claims under section 12 of the Securities Act of 1933, which is codified at 15 U.S.C. § 77(*l*) (2016), as well as common law claims for rescission. Section 517.211(2) limits liability to persons involved directly in the sale of the security and damages are limited to the

consideration paid. 537 So. 2d at 981. A claim for rescission under section 517.211 includes: 1) a misrepresentation or omission, 2) of a material fact, 3) on which the buyer relied.[17] See Kashner Davidson Sec. Corp. v. Desrosiers, 689 So. 2d 1106, 1107 (Fla. 2d DCA 1997) (citing Rousseff, 537 So. 2d at 981).

The defendants argue that there are genuine issues of material fact as to all three elements of Geveran's claim. We focus on the second and third elements—materiality and reliance—and find there are genuine issues as to both.[18] Although few Florida courts have addressed the issue, the majority of federal courts interpreting section 517.301 have adopted the test for materiality developed by the United States Supreme Court for rule 10b-5 claims.[19] See, e.g., Grippo v. Perazzo, 357 F.3d 1218, 1222 (11th Cir. 2004) (noting the elements of a section 517.301 claim are similar to those under Federal Rule 10b-5 with some exceptions). Under rule 10b-5, a material fact is a fact that would be important to a reasonable investor in deciding whether to invest—meaning that there is a

[17] At oral argument, counsel for Geveran conceded that reliance is an element of a claim under section 517.211. We note that one federal court has found that reliance is not an element under that section. Waters v. Int'l Precious Metals Corp., 172 F.R.D. 479, 492–96 (S.D. Fla. 1996). Geveran has also not argued here or below that reliance should be presumed given that its claim is based on an omission. Cf. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152 (1972) (concluding that court erred in requiring reliance in case involving omission of material information under rule 10b-5).

[18] As to the first element, misrepresentation or omission, LSG's failure to disclose the SEC letters to Halvorsen was a clear omission. We note, however, that note five of LSG's 2010 form 10-K disclosed LSG's decision to treat obsolete inventory as a cost of goods sold. While we doubt that this disclosure, standing on its own, would be sufficient—Geveran has no obligation to consult an accountant to review the entire form 10-K—it is worth noting that the information was disclosed, albeit not in a form easily accessible to investors. In addition, Namburi testified that he actually disclosed the SEC comment letters to Halvorsen. While that testimony is of questionable reliability given its lack of specificity, assessing the credibility of a witness is generally a matter for the jury.

[19] 17 C.F.R. § 240.10b-5 (2016) (implementing 15 U.S.C. § 78j (2016)).

"substantial likelihood" the reasonable investor would have viewed the misrepresentation as altering the "total mix" of available information. Basic Inc. v. Levinson, 485 U.S. 224, 231–32 (1988) (adopting materiality standard from TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); cf. Restatement (Second) of Torts § 538 ("The matter is material if [] a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question . . . ."); SEC Staff Accounting Bulletin: No. 99, 64 Fed. Reg. at 45151 (noting that the accounting standard for materiality is "in substance identical to the formulation used by the courts in interpreting the federal securities laws").

Geveran recognizes the inherent factual issues in determining whether the 2008 and 2009 restatements of gross margins were themselves material. Geveran focuses instead on the concealment of the SEC comment letters and LSG's failure to maintain GAAP compliant financial records as the material omissions and misrepresentations to support the order granting summary judgment. The subscription agreement between the parties included detailed assurances that LSG's 2010 form 10-K complied with GAAP and all relevant SEC rules. Halvorsen's deposition testimony repeatedly emphasized the importance of GAAP compliance to Geveran not only because GAAP compliance allows for an objective evaluation of the financial strength of a particular investment, but also because GAAP compliance was necessary to obtain SEC approval of LSG's re-IPO.

Geveran's FSIPA claim, however, is not a claim on the subscription agreement, but rather a statutory claim, meaning that materiality must be based on the effect of the omission and misrepresentation on a reasonable investor looking at the total mix of information. See Levinson, 485 U.S. at 231–32. McGladrey looked at LSG's accounting

error, prepared its own analysis, and determined that the misrepresentation of the 2008 and 2009 gross profits was not material and that LSG's 2008 and 2009 financial statements remained materially compliant. The defendants' expert witnesses concurred in this assessment. They focused on the significant changes to LSG's business model from 2008 and 2009 to 2010. In addition, GAAP are not a single, unified standard but rather a set of possible accounting treatments. See Thor Power Tool Co. v. C.I.R., 439 U.S. 522, 544 (1979) (noting GAAP compliance is not a single standard). We believe a reasonable juror could infer from these facts that the accounting error regarding the 2008 and 2009 gross margins would not be a material misrepresentation to a reasonable investor.[20]

Geveran points out that LSG quickly acquiesced to the SEC's recommendation that the 2008 and 2009 financial statements needed to be restated, a step that the SEC only requires for past financial statements if the restatement is material. Yet many federal courts have held that a misstatement under the accounting standard for materiality is not per se material as a legal matter. See, e.g., In re Atlas Mining Co., Sec. Litig., 670 F. Supp. 2d 1128, 1133 (D. Idaho 2009) (rejecting theory, under rule 10b-5, that restatement of financials is an admission of falsity and materiality and collecting cases). The fact that LSG agreed to restate its previous financial statements is strong evidence of a material omission, but it is not dispositive and must be weighed against expert testimony and

[20] Halvorsen's own analysis of LSG looked to LSG's recent contract with Home Depot and shifting base of manufacturing from the United States to Mexico, suggesting the 2008 and 2009 gross margins were not material to the investment decision.

analysis by LSG's accountant along with the fact that LSG's business model was changing significantly, making the 2008 and 2009 financials less relevant.[21]

Finally, we note as well that materiality is most often a jury question as it involves a full assessment of the various potentially relevant facts and surrounding circumstances. See Ward v. Atl. Sec. Bank, 777 So. 2d 1144, 1146 (Fla. 3d DCA 2001). Although we do not doubt that Geveran has a strong argument that LSG's misstatements were material, ultimately assessing alternative versions of events based on a review of various documents and competing testimony is the role of the jury. We do not believe, given the circumstances of this company, that the defendants' omission of the SEC comment letters and the misrepresentation that the 2008 and 2009 financial statements were GAAP compliant were material as a matter of law.

In addition to a genuine issue of fact as to materiality, we also find a genuine issue of material fact exists as to whether Geveran relied on the omitted SEC letters and the misrepresented accounting figures. Consistent with Geveran's concession and the Florida Supreme Court's opinion in Rousseff, Geveran must show that it actually relied on the omission or misrepresentation. See 537 So. 2d at 981. But see Waters, 172 F.R.D. at 492–96 (finding that statement as to justifiable reliance in Rousseff was dicta and holding reliance is not an element of a section 517.301 claim seeking rescission).[22]

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[21] We are mindful that Geveran was not only investing in a product line but also in the entire company. Nonetheless, the shift in LSG's core operations creates a genuine issue of fact as to the materiality of LSG's past performance.

[22] We note as well that the Florida Supreme Court's decision in Rousseff refers to justifiable reliance. 537 So. 2d at 981. Yet many cases state that the plaintiff in a FSIPA claim need only show that the plaintiff relied on the omission or misrepresentation not that such reliance was justified. See, e.g., Desrosiers, 689 So. 2d at 1107 (holding reliance is an element of a cause of action under 517.301). In the context of common law claims, the

Even though an average investor would generally rely on assurances given in an investment contract, Halvorsen is not an average investor. Halvorsen was given complete access to confidential information at LSG as well as J.P. Morgan's due diligence materials. By his own admission, he looked carefully at LSG and performed an extensive independent review. Halvorsen was adamant during his deposition that he was not an accountant and could not have identified the flaws in LSG's accounting merely by reading

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Florida Supreme Court has held that the level of reliance required is dictated by the level of culpability required to establish liability—liability for merely negligent misrepresentations extends only to statements justifiably relied on while liability for fraudulent statements extends to any statement actually relied on. See Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (reiterating justifiable reliance is an element of a negligent misrepresentation claim but not a claim for fraudulent misrepresentation); see also Restatement (Second) of Torts § 552 cmt. a (1977) ("The liability stated in this Section is likewise more restricted than that for fraudulent misrepresentation stated in § 531. When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.").

In the context of a statutory claim under section 517.301 based on a direct sale, we believe it is appropriate to presume that the reliance was justified. The exhaustive statutory scheme created by the FSIPA evidences a legislative intent to extend liability beyond the common law cause of action for negligent misrepresentation and encourage investors to rely on representations from a seller of securities.

As to the state of mind required to establish liability, we follow the majority of decisions surveyed in finding that liability exists for mere negligence. See, e.g., Gochnauer v. A.G. Edward & Sons, Inc., 810 F.2d 1042, 1046 (11th Cir. 1987). Claims under the FSIPA seeking rescission based on a direct sale are more similar to section 12 claims under the federal Securities Act of 1933. Rousseff, 537 So. 2d at 981. In a section 12 claim, the burden is on the defendant to show that "he did not know, and in the exercise of reasonable care could not have known" of the falsity of the information—although recent amendments have added a requirement that the plaintiff show the omission caused its damages. 15 U.S.C. § 77(*l*). We believe it would be inconsistent to require a plaintiff proceeding under Florida law to prove fraudulent intent when the same plaintiff proceeding under federal law would not be so required. See § 517.24, Fla. Stat. (2012) (providing that "[t]he same civil remedies provided by laws of the United States for the purchasers or sellers of securities, under any such laws, in interstate commerce extend also to purchasers or sellers of securities under [the FSIPA]").

note five of the 2010 form 10-K. Yet a jury could determine that Halvorsen conducted an independent assessment of LSG and made his own decision to invest by relying on information other than the 2008 and 2009 gross margins.

Furthermore, the circumstances surrounding the restatement suggest that Halvorsen might not have relied on the omissions and misrepresentations. Halvorsen did not react unfavorably when he learned of the restatement, and he continued to take an optimistic view of LSG. Only when LSG's re-IPO continued to lag and the company began to offer more favorable credit terms to lure new investors did Halvorsen object and bring suit. Even though the contract provisions and Halvorsen's testimony are powerful evidence that compliance with SEC regulations and GAAP principles was important to the investment, there is a genuine issue of material fact as to whether Halvorsen relied on those assurances in determining whether to invest or whether he made the decision based on other information. His own assessment of LSG focused on the market for green-energy technology generally and specific challenges facing LSG in shifting its manufacturing base.

Therefore, we reverse the trial court's order granting summary judgment on Geveran's claims under the FSIPA. We find there are genuine issues of material fact as to whether the omission of the SEC letters and the misrepresentation of LSG's 2008 and 2009 financial statements were material to a reasonable investor. We also find there is a genuine issue of material fact as to Halvorsen's reliance on those omissions and misrepresentations.

Finally, we turn to Namburi, Schreck, and Pegasus's claims that they are not liable under FSIPA.[23] Section 517.211 creates liability for two classes of persons: 1) sellers, and 2) "every director, officer, partner, or agent of . . . [the] seller." § 517.211(2), Fla. Stat. Liability for the second category is further limited to those persons who "personally participated or aided in making the sale or purchase." Id. Although "seller" is not a defined term under the statue, the federal courts that have considered the issue of who is a "seller" under section 517.211 have relied on the United States Supreme Court's decision in Pinter v. Dahl, 486 U.S. 622 (1988), which held that liability under section 12 of the Securities Act extends to anyone who solicits an investment "motivated at least in part by a desire to serve his own financial interests or those of the securities owner." 486 U.S. at 647; see also Hilliard v. Black, 125 F. Supp. 2d 1071, 1083 (N.D. Fla. 2000) (noting reliance on Pinter); Beltram v. Shackleford, Farrior, Stallings, & Evans, 725 F. Supp. 499, 500 (M.D. Fla. 1989) (same).

As to Pegasus, Geveran focuses on Pegasus's role in soliciting Geveran's investment as a majority, controlling shareholder of LSG, which could bring Pegasus under the category of "seller" for the purposes of section 517.211. See Pinter, 486 U.S. at 647. LSG's S-1/A and 2010 form 10-K disclosed Pegasus as a controlling shareholder in LSG. There is no dispute that Pegasus had a significant financial interest in LSG. Thus,

[23] Pegasus only appeals from the denial of its motion for summary judgment. Accordingly, we assess the record under the summary-judgment standard of review. J.P. Morgan appeals from the denial of its motion to dismiss the claims against Namburi and Schreck. We review the order denying the motion to dismiss de novo to assess whether the allegations contained within the four corners of the complaint, taken in the light most favorable to Geveran, state a claim for which relief could be granted. See Huet v. Mike Shad Ford, Inc., 915 So. 2d 723, 725 (Fla. 5th DCA 2005).

there is, at a minimum, a genuine issue as to whether Pegasus would have benefited from Geveran's investment.

There is also a genuine issue as to whether Pegasus and its employees solicited Geveran's investment and participated in the alleged omission and misrepresentations. The record shows involvement by employees of Pegasus in making the sale. Weinberg, in addition to his position with LSG as CEO, was a senior partner at Pegasus and was on the board of LSG as a representative of Pegasus and its controlling interest in LSG. Weinberg attended the meeting in Florida and was a primary salesman, according to Halvorsen. In addition, Jared Berheim and Steven Wacaster, two other Pegasus representatives, participated in the meeting. Weinberg, Bernheim, and Wacaster were also provided copies of the SEC comment letters soon after they were received.

Pegasus argues, nonetheless, that it cannot be liable under section 517.211 because of the buyer/seller privity requirement it claims the Florida Supreme Court recognized in Rousseff. 537 So. 2d at 981. This statement from Rousseff is misleading, however. Section 517.211, by its plain language, extends liability to "every director, officer, partner, or agent of or for the purchaser or seller." § 517.211(2), Fla. Stat. Such parties would not necessarily be in privity of contract with the buyer or seller in a strict sense. Rousseff established that parties liable under section 517.211 have to be directly involved in a sale of securities. The Court was distinguishing liability under section 517.211 from liability under federal rule 10b-5, which extends to fraud more generally, whether conducted during the sale of securities or not.[24] The Court used "privity" as a

[24] Rousseff, 537 So. 2d at 981 ("Rule 10b-5 is wide-ranging, covering a broad spectrum of fraud. It applies to any person who is deceitful in connection with the purchase or sale of securities. It requires no privity between buyer and seller. Remedies

short-hand for a direct sale of securities distinct from general corporate malfeasance. See In re Sahlen & Assocs., Inc. Sec. Litig., 773 F. Supp. 342, 372 (S.D. Fla. 1991) (disapproving of a reading of Rousseff in the "strict sense" based on the plain language of the statute); see also Michael A. Hanzman, Civil Remedies Under the Fla. Secs. & Investor Protection Act, 64 Fla. Bar J. 36 (Oct. 1990) (approving of Rousseff in general but noting that the privity requirement, in a strict contractual sense, cannot be correct). In this context, section 517.211 is transaction-specific, while other provisions of Florida statutory and common law reach other types of wrong-doing by corporate officers.

To summarize, Pegasus's pecuniary interest in Geveran's investment and the evidence of its participation in soliciting the investment creates a genuine issue of fact as to Pegasus's liability as a seller under the FSIPA, making the denial of Pegasus's motion for summary judgment appropriate. Yet, as with LSG and J.P. Morgan, genuine issues of material fact preclude summary judgment in Geveran's favor on its FSIPA claim.

As to Namburi and Schreck, Geveran's second amended complaint alleged that Namburi and Schreck were liable under section 517.301 for soliciting Geveran's investment and as agents of the seller, LSG. While Geveran's complaint alleges that Namburi and Schreck "solicited the sale of LSG stock," it does not allege that Namburi and Schreck had a personal interest in the transaction—only that J.P. Morgan would receive an agency fee. There is also no allegation that Namburi and Schreck acted to

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are not restricted. . . . The Florida statutes, on the other hand, are far more restrictive. . . . Section 517.211 says that if a seller (or buyer) is untruthful in a sale, the buyer (or seller) can rescind the transaction and get his money back. This provision applies to a far more narrow group of activities than does rule 10b-5. Buyer/seller privity is required.").

serve the interests of LSG, given that they were actually employees of J.P. Morgan. Thus, Geveran has not alleged facts sufficient to state a claim on the basis that Schreck and Namburi are liable as "sellers."

As noted above, section 517.211(2), Florida Statutes (2012), also extends liability to "every director, officer, partner, or agent of or for the purchaser or seller, if the director, officer, partner, or agent has personally participated or aided in making the sale or purchase." It is undisputed that Namburi and Schreck were not directors, officers, or partners of LSG, so if they are liable under this category, it must be as agents of LSG. The Fourth District Court of Appeal has held that under section 517.211, the term "agent" is given its common meaning—"representation of a principal." Rubin v. Gabay, 979 So. 2d 988, 990 (Fla. 4th DCA 2008). Agency can either be actual or apparent. Id. The elements of actual agency are: 1) acknowledgment by the principal of the agent; 2) the agent's acceptance; and 3) control of the agent by the principal. Id.

While Namburi signed the agency agreement with LSG, he did so as an employee of J.P. Morgan and not in his personal capacity. Schreck did not sign the agreement and had a narrower role in the transaction. The second amended complaint specifically alleges that J.P. Morgan had a contractual relationship with LSG to act as its agent in soliciting the investment and attached the agreement to the complaint. The complaint does not allege or demonstrate that either Namburi or Schreck accepted an agency agreement with LSG or that LSG exercised control over them. Therefore, Geveran failed to state a cause of action against Namburi and Schreck based on an actual agency theory.

Likewise, whatever apparent agency is alleged to exist in the transaction was apparent agency between J.P. Morgan and LSG, rather than Namburi, Schreck, and LSG. The elements of apparent agency are: 1) a representation by the principal; 2) reliance by a third party; and 3) a change in position by the third party based on the representation of an agency relationship. Id. The second amended complaint does not allege any facts relating to these elements but merely asserts that Namburi and Schreck were agents or "subagents" of LSG by virtue of their employment with J.P. Morgan. This is insufficient to state a cause of action under an apparent agency theory.

Geveran argues that Namburi and Schreck are nonetheless liable because they "personally participated or aided in making the sale." § 517.211(2), Fla. Stat. Yet personal participation is a limitation on the list of people enumerated in the statute who may be liable—officers, directors, partners, and agents who personally participated. Geveran essentially reads additional language into the statute that would extend liability to anyone who personally participated or aided in the sale even if the party did not have a pecuniary interest in the investment and did not qualify as an officer, director, partner or agent under the statute. This reading conflicts with the statutory text and is not supported by any other source. Therefore, because Geveran failed to allege facts that would establish that Namburi and Schreck were agents of LSG, the trial court erred in denying J.P. Morgan's motion to dismiss Geveran's claim against them.

In sum, we find that the complaint did not state a claim against Namburi and Schreck. Therefore, the trial court's order denying J.P. Morgan's motion to dismiss Geveran's claims against Namburi and Schreck is reversed and remanded with directions for the court to dismiss the claims against them. The summary final judgment entered

against the remaining defendants, including Pegasus, is reversed because there are genuine issues of material fact as to the materiality of LSG's misrepresentations and omissions as well as to Geveran's reliance. The case is remanded for further proceedings.

REVERSED; REMANDED with instructions.

SAWAYA and WALLIS, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1,

Appellant,

v. Case No. 5D16-156

CHARLES LIPARI,

Appellee.

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Opinion filed August 4, 2017

Appeal from the Circuit Court
for Brevard County,
David Dugan, Judge.

Melanie S. Weseman, of Pollack & Rosen, P.A., Coral Gables, and Dayle M. Van Hoose, of Sessions, Fishman, Nathan & Israel, LLC, Tampa, for Appellant.

Jordan T. Isringhaus, Ian R. Leavengood and G. Tyler Bannon, of Leavenlaw, St. Petersburg, for Appellee.

ON MOTION FOR REHEARING AND CLARIFICATION

PER CURIAM.

Upon consideration of Appellee's motion for rehearing and clarification, our opinion of May 19, 2017, is withdrawn and the following substituted therefor. The motion for rehearing is denied, and the concurrent motion for clarification is granted in part.

The National Collegiate Student Loan Trust 2007-1 ("NCT") appeals a final summary judgment entered in favor of Charles Lipari in an action to collect on a note. Appellee's son, Nicholas Lipari, entered into a student loan agreement with JPMorgan Chase Bank, N.A. The loan obligation was co-signed by Appellee. Nicholas Lipari failed to make payment, and the loan went into default. NCT then filed an action to collect against both Appellee and his son. Appellee contends that NCT failed to provide notice of an assignment of the debt to him as required by the Florida Consumer Collection Practices Act ("FCCPA"), section 559.715, Florida Statutes (2007), prior to filing suit. Appellee further contends that notice of the assignment is a condition precedent to the filing of a collection lawsuit under Florida law. The trial court agreed and entered judgment in favor of Appellee. We disagree and reverse.

The FCCPA permits a creditor to assign the "right to bill and collect a consumer debt." § 559.715, Fla. Stat. (2007). In so doing, such an assignee is required to give written notice to the debtor within thirty days after assignment. According to its plain language, the notice requirement contained in section 559.715 does not apply to an assignee that takes all rights to the consumer debt. *Deutsche Bank Nat'l Tr. Co. v. Hagstrom*, 203 So. 3d 918, 921 (Fla. 2d DCA 2016) ("[S]ection 559.715 applies only to assignees of the right to bill and collect a consumer debt not to assignees of the debt itself."). Instead, it applies only to an assignee of the right to "bill and collect." In the instant case, the entire note originally made by JPMorgan Bank, N.A. was assigned to NCT. No rights were retained by the assignor. Therefore, section 559.715 does not apply.

Moreover, even if NCT were an assignee as contemplated by the FCCPA, notice of assignment is not a condition precedent to filing suit. Rather, section 559.715, Florida Statutes (2007), merely requires notice "within 30 days after the assignment." The Legislature knows how to create a condition precedent when it so desires, and it did not do so here. While failure to properly provide a notice may violate the FCCPA in certain circumstances, there is simply no language in the statute to suggest that such a notice is a condition precedent to suit. *Accord Bank of Am., N.A. v. Siefker*, 201 So. 3d 811 (Fla. 4th DCA 2016) (interpreting the post-2010 version of section 559.715); *Brindise v. U.S. Bank Nat'l Ass'n,* 183 So. 3d 1215 (Fla. 2d DCA 2016) (interpreting the post-2010 version of section 559.715).[1] In short, it is not for the court to rewrite the statute, and we decline Appellee's invitation to do so.

Accordingly, we reverse the summary judgment entered in favor of Appellee and remand the matter to the trial court.

REVERSED and REMANDED.

EVANDER, BERGER, and EISNAUGLE JJ., concur.

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[1] We note that *Siefker* and *Brindise* were decided after the Legislature amended section 559.715 in 2010 to provide:

> This part does not prohibit the assignment, by a creditor, of the right to bill and collect a consumer debt. However, the assignee must give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. The assignee is a real party in interest and may bring an action to collect a debt that has been assigned to the assignee and is in default.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

ANTHONY I. PROVITOLA AND
KATHLEEN A. PROVITOLA,

Appellants,

v. Case No. 5D16-3027

DENNIS L. COMER,

Appellee.

_____/

Opinion filed August 4, 2017

Appeal from the Circuit Court
for Volusia County,
Randell H. Rowe, III, Judge.

Anthony I. Provitola of Anthony I. Provitola, P.A., DeLand, for Appellants.

Lindsay R. Dunn, of First American Law Group, Largo, and F. A. (Alex) Ford, Jr., of Landis Graham French, P.A., DeLand, for Appellee.

PER CURIAM.

We affirm the final order dismissing Appellants' second amended complaint with prejudice. *See Bozeman v. City of St. Petersburg*, 76 So. 894, 896 (Fla. 1917) (holding that plaintiff could not maintain action to enjoin obstruction of public street where plaintiff's allegations were insufficient to show that he suffered "some special damage to his

property or injury to him different not only in degree but in kind from the damage sustained by the community at large" (quoting *Robbins v. White*, 42 So. 841 (Fla. 1907))); *Wedner v. Escambia Chem. Corp.*, 102 So. 2d 631, 632 (Fla. 1st DCA 1958) ("The unauthorized obstruction of a public way is a common or public nuisance. It is not in itself ground upon which to maintain a private suit for injuries occasioned thereby. In order to maintain such a suit it must be shown that the party seeking relief has suffered some special injury, differing not only in degree, but in kind from that sustained by the community at large.").

We dismiss, without prejudice, Appellants' appeal of the trial court order determining that Appellee was entitled to recover attorney's fees under section 57.105, Florida Statutes (2016). An order that determines entitlement to attorney's fees without setting the amount is a non-final, non-appealable order. *Adlow, Inc. v. Mauda, Inc.*, 632 So. 2d 714, 714 (Fla. 5th DCA 1994). [1]

AFFIRMED, in part; DISMISSED, in part.

EVANDER and EDWARDS, JJ., and ATKIN, J.E., Associate Judge, concur.

[1] The other issues raised on appeal are rendered moot by our affirmance of the trial court's order of dismissal.